

NOTICE

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2014 IL App (5th) 110212-U

NO. 5-11-0212

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

ROBERT MONTIJO,

Defendant-Appellant.

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Appeal from the
Circuit Court of
Jackson County.

No. 10-CF-425

Honorable
W. Charles Grace,
Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Spomer and Wexstten concurred in the judgment

¶ 1 *Held:* The defendant was not denied effective assistance of counsel due to counsel's failure to exclude evidence that his fingerprints and DNA profile were contained in databases or failing to object and moving to strike that portion of the State's opening statement that indicated that the defendant refused to give the State a DNA sample for DNA comparison. The evidence was sufficient to prove that the defendant was armed with a firearm when he committed the offense of home invasion.

¶ 2 A jury found the defendant, Robert Montijo, guilty of home invasion in violation of section 12-11(a)(2) of the Criminal Code of 1961 (the Criminal Code) (720 ILCS 5/12-11(a)(2) (West 2010)) and of home invasion while personally armed with a firearm in violation of section 12-11(a)(3) of the Criminal Code (720 ILCS 5/12-11(a)(3) (West 2010)). The circuit court sentenced the defendant on the latter conviction to 10 years' imprisonment with a mandatory 15 year add-on for being armed with a firearm. The defendant appeals, arguing that he was denied his sixth amendment right to effective assistance of counsel. Specifically, the defendant argues that his attorney was ineffective when he did not object to evidence that he had been arrested seven years earlier for an unrelated offense and that his

fingerprints and DNA profile were contained in databases. He argues that his attorney was ineffective because he did not object to a portion of the State's opening statement in which the prosecutor told the jury that the defendant, after his arrest, refused to give the State a DNA sample for DNA comparison. The defendant also argues that the evidence presented at the trial was insufficient to support the 15 year mandatory add-on for the possession of a firearm beyond a reasonable doubt. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 The defendant's arguments on appeal raise issues that concern certain pretrial proceedings as well as evidence and arguments presented at the trial. Our background discussion focuses on those aspects of the pretrial and trial proceedings that are relevant to the issues raised on appeal.

¶ 5 During the early morning hours on May 4, 2010, Jenna Bazzell and Lindsey Rodgers were asleep in their second-floor apartment located in Carbondale, Illinois, when they heard a loud banging noise on their front door. Jenna got out of bed, walked down the hallway toward the front door, and saw that the door had been knocked off of its hinges and that two men were inside the apartment. The first man brandished what appeared to the victims to be a black handgun. He wore a black hooded sweatshirt with the hood pulled up and a navy blue bandana folded into a triangle over his face. Although only his eyes and eyebrows were exposed, the victims identified the gunman as being Hispanic. Neither of the victims were able to identify the gunman's face. The second man was taller and was an African American male. He was not wearing a mask and did not have a gun.

¶ 6 The gunman pointed the gun at Jenna's head as she backed up into the bedroom where Lindsey was sitting on the bed. The gunman stated: "We are not rapists. We are not murderers. We just want money." Jenna pointed to the dresser that had a notebook, papers, and envelopes on top of it. She told the men that the notebook had money in it. The victims

testified that the gunman held the gun in his right hand while he rummaged through the papers on the dresser. The gunman, who was not wearing gloves, opened the notebook and took between \$200 and \$300. The gunman kept the gun pointed at them the entire time. Jenna stated that he was very close to them, within reaching distance.

¶ 7 During this time the unarmed man was in the bedroom across the hall. The victims could hear him opening and closing their file cabinet and taking things out. The gunman remained in the bedroom with the gun pointed at them during the three to four minutes the men were in the house. Once the gunman had retrieved the money, he grabbed Jenna and Lindsey's cell phones from their dresser, took the phones into the bathroom, and threw them into the toilet before the men ran out of the door.

¶ 8 Jenna waited a few moments before going outside to see if the men were still around. She noticed a navy blue bandana folded into a triangle shape and tied at the ends like a mask. It looked like the mask that the gunman wore. It was lying on the sidewalk at the bottom of the stairs, approximately six or seven feet in front of the apartment building. Jenna carefully picked up the bandana between two fingers and placed it in a gallon-sized plastic bag. She later testified that she was attempting to preserve any DNA that might be on the bandana. After retrieving the bandana and placing it in the bag, the victims called the police.

¶ 9 When officers from the Carbondale police department arrived, the victims turned the bandana over to them. Crime scene technicians dusted the apartment for fingerprints and collected evidence. The officers were able to collect a number of latent fingerprints from the victims' bedroom. They also collected the notebook, papers, and envelopes touched by the gunman and processed them for fingerprints.

¶ 10 The Carbondale police sent the collected evidence to the Illinois State Police Crime Lab for analysis. Nearly three months later, the state police identified a DNA match between the DNA found on the bandana and the defendant's DNA that was stored in a DNA database

that was identified at the trial as CODIS. After identifying a DNA match, investigators obtained a fingerprint card that contained the defendant's fingerprints. The fingerprint card had been created at the Jackson County jail after a previous arrest in 2003. Investigators compared the fingerprint card with one of the fingerprints taken from the crime scene and determined that the fingerprint from the crime scene matched the middle right fingerprint of the defendant. The defendant was arrested and charged with home invasion and home invasion while armed with a firearm.

¶ 11 Prior to the defendant's jury trial, on the State's motion, the circuit court ordered the defendant to provide his hair, blood, and saliva samples so that the State could obtain a DNA sample. The defendant refused to comply with the court's order and submit to a buccal swab. On September 8, 2010, the State filed a petition for a rule to show cause why the defendant should not be held in contempt of court for refusal to comply with the court's order. The circuit court found the defendant in civil contempt for refusing to submit to a buccal swab. Despite the court's contempt finding, the defendant still refused to cooperate with a buccal swab.

¶ 12 On October 15, 2010, the circuit court conducted a hearing on the State's petition for supplemental relief due to the defendant's continued refusal to submit to a buccal swab. At the hearing, the defendant's counsel stated that the defendant wanted the Illinois State Police to take the DNA sample because he believed that the Carbondale police department was biased against him. The circuit court denied the defendant's request and entered an order authorizing the Carbondale police department to use all reasonable force to collect the buccal swab from the defendant. The defendant finally submitted to the buccal swab testing on October 19, 2010, and the swab was sent to the crime lab for DNA analysis.

¶ 13 At the defendant's jury trial, the State made the following comment during opening statements about the defendant's refusal to submit to a buccal swab:

"[W]e asked to have the defendant give what's called a buccal swab. It is essentially a Q-tip where they swab the inside of your mouth to get your cells so that the defendant's DNA profile could be developed. Well, guess what? The Court ordered the defendant to give that buccal swab, and *** he refused to have the buccal swab taken. He refused to give his DNA, such that we had to go through further court proceedings until the defendant finally gave it up on October 19."

¶ 14 Defense counsel did not object during the State's opening statements.

¶ 15 During the trial, the victims testified that they did not know the defendant and had never seen him before. They testified that they had never invited the defendant into their apartment and that they did not believe that the defendant had ever been in their apartment prior to the home invasion. They testified that the defendant had no reason to rummage through their paperwork in their bedroom.

¶ 16 Jenna identified the bandana that she had picked up from the sidewalk and placed into the bag. Lindsey identified the bandana found at the crime scene as the one the gunman wore the night of the home invasion.

¶ 17 When asked to describe the defendant's gun to the jury, Jenna testified as follows:

"A. It was a black automatic handgun. It was not a revolver. It had no distinct characteristics.

Q. Are you familiar with guns?

A. No, not at all.

Q. So how did you know it was a semi-automatic?

A. Well, the revolver, you know, protrudes out of the gun, so it obviously was not a revolver. It didn't have backing to the gun where you would pull a backing to it, so it has to be an automatic.

Q. And you said it was black?

A. Yes.

Q. About how long was it?

A. About like this.

Q. For the record, would you say that that's six or seven inches?

A. Yea, it was a handgun.

Q. And when you encountered this first person in the hallway, what did he do with regard to the gun?

A. Pointed it at my head."

¶ 18 Lindsey described the gun as follows:

"A. Black and square and about that big. I don't know much about guns.

Q. For the record you are holding—

A. Six inches.

Q. Six inches?

A. Yeah, that long.

Q. And are you familiar with guns?

A. No.

Q. Do you know the difference between a semi-automatic and a revolver?

A. No.

Q. So you don't—you wouldn't be able to say what kind of gun this was?

A. Absolutely not.

Q. Black and square?

A. Black and square.

Q. And where was it pointed?

A. Pointed just towards us on the bed holding us in position."

¶ 19 The State called Deputy Horstmann, who testified that prior to becoming a deputy, he

worked as a booking officer at the Jackson County jail. Part of his duties were to fingerprint and process people who had been arrested. Deputy Horstmann identified fingerprint cards that contained the arrest prints that he had taken of the defendant on September 7, 2003, nearly seven years before the home invasion. He then made an in-court identification of the defendant as the man whose prints he had taken in 2003. The defendant's counsel did not object to this testimony.

¶ 20 On the second day of trial, outside of the presence of the jury, the defendant's counsel filed and argued a motion *in limine* in response to the State's opening statements. The motion sought to prohibit the State from presenting evidence, either directly or indirectly, that the defendant had refused to provide a DNA sample. The defendant's counsel argued that testimony regarding the defendant's refusal to give a DNA sample was prejudicial. He further argued that the defendant's refusal was based on his mistrust of the Carbondale police department and that the defendant had been willing to have the Illinois State Police take the DNA sample.

¶ 21 The circuit court asked the defendant's attorney why he had not filed the motion *in limine* before the proceedings began. The attorney stated that he had not anticipated that the State would comment on the refusal during opening statements. The circuit court denied the defendant's motion, noting that the motion *in limine* was not timely and that granting the motion would impair the State's presentation of evidence since the reference was already made in the opening statement. The circuit court also found that the State's reference to the defendant's refusal to submit to a buccal swab was not prejudicial.

¶ 22 The circuit court subsequently revisited the defendant's motion *in limine* and listened to further arguments. The State argued that the defendant's refusal to submit to the buccal swab was relevant because it led to a reasonable inference that he had something to hide. The defendant's counsel reiterated that the defendant only refused to have the Carbondale

police department conduct the buccal swab testing and, therefore, evidence of the defendant's refusal was not relevant. After further consideration of the issue, the circuit court granted the defendant's motion *in limine*. The court instructed the State to prohibit its witnesses from testifying regarding the defendant's refusal to submit to the buccal swab.

¶ 23 Next, Lisa O'Daniel, an expert in fingerprint examination with the Illinois State Police crime lab, testified about her role in the investigation. She testified that her task was to compare the defendant's fingerprint cards to the prints found at the crime scene. She testified that she obtained two cards containing the defendant's fingerprints to compare with prints found at the crime scene. When asked what agency had supplied the first card, O'Daniel testified, "It came from our Illinois State Police database that we use for AFIS." Regarding what agency provided the second card, O'Daniel testified: "[The] Carbondale Police Department submitted them to me. I don't have any knowledge of where they obtained them from."

¶ 24 O'Daniel testified that she was able to photograph a fingerprint found on an envelope taken from the victims' apartment and compare it to the fingerprints on the cards. She testified that based on the comparison, she was able to identify the defendant's right middle fingerprint on the envelope taken from the victims' home. O'Daniel testified that she could not say for certain if there was only one of the defendant's fingerprints on the papers she examined because she stopped looking after she found the defendant's right middle fingerprint.

¶ 25 On cross-examination, the defendant's attorney asked O'Daniel, "what is AFIS?" O'Daniel responded as follows:

"AFIS is our Automated Fingerprint Identification System. AFIS is a tool we use when there is no suspect or subject that the agency would like us to compare a fingerprint to. We can search it in the database and see if we can bring up any

individual that that fingerprint might belong to."

¶ 26 Dee Cross of the Carbondale police department also testified on behalf of the State. When asked to describe her duties, Cross stated, "I am a latent fingerprint examiner, so if a fingerprint is developed that's suitable for comparison, I can actually compare it to known offenders or to our known data base, called an AFIS system." On cross-examination, Cross testified that she was not certified as a latent fingerprint examiner but had 12 years of on-the-job training. The State asked the court to qualify Cross "as a latent print examiner for comparison purposes." The defendant objected. The circuit court sustained the defendant's objection, did not qualify Cross as an expert, and ruled that her proposed testimony regarding the fingerprint cards was not relevant. Accordingly, Cross did not testify any further.

¶ 27 Corey Kemp, a detective with the Carbondale police department, testified that after the DNA comparison analysis identified the defendant's DNA on the bandana found at the crime scene, he went to interview the defendant who was being held at the county jail. Detective Kemp testified that when he advised the defendant that his DNA was discovered on the bandana, the defendant stated that he did not own a bandana and had no idea why his DNA would be on the bandana. When asked how his DNA could have gotten close to where the victims' apartment was located, the defendant responded that he did not frequent that side of town.

¶ 28 On cross-examination, the defendant's counsel asked Detective Kemp, "Okay, and so when a hit came back from the, I guess, CODIS, you called it?" Detective Kemp answered, "I believe so." This was the only reference made to CODIS during the trial.

¶ 29 Suzanne Kidd, a forensic scientist with the Illinois State Police Crime Lab, testified as an expert witness on behalf of the State. Part of her duties as a forensic scientist includes conducting DNA analysis. She testified that she conducted DNA analysis on the blue bandana found outside the victims' apartment. She developed two DNA samples. First, she

swabbed the inside of the bandana that would have been closest to the gunman's nose and mouth. Then she swabbed the ends of the bandana where it had been tied. She generated a DNA profile from both samples that indicated a mixture of two people with a predominant profile in each sample, meaning that a majority of the DNA came from one person. Kidd then developed a DNA profile from the defendant's buccal swab that had been provided by the Carbondale police department. Kidd testified that the predominant DNA profile from the bandana matched the DNA profile of the defendant taken from the buccal swab.

¶ 30 The defendant called his girlfriend, Syrena Payne, to testify as an alibi witness. Payne testified that she was the defendant's girlfriend at the time of the home invasion and that the defendant, who was not employed during this time, lived with her and her four children. She told the jury that on a "general day" she and the defendant would get up at 6 a.m. in order to get her children ready for school. The defendant would cook breakfast while she got the children dressed and ready.

¶ 31 Payne testified that the defendant was home at 6 a.m. on the morning of the home invasion. She testified that there was nothing specific going on that day, but she knew the defendant was home because it was a "normal" school day and there were no mornings in May 2010 that the defendant was not home. She testified: "[The defendant] is always home. They just don't—he doesn't hang out or anything, he is always at home." Payne also testified that the defendant did not wear bandanas and that she has never known him to have a weapon. She had no explanation concerning why the defendant's DNA was on the blue bandana.

¶ 32 At the end of the trial, the jury returned a guilty verdict on both charges: home invasion and home invasion while armed with a firearm. The circuit court sentenced the defendant on the latter conviction and imposed a 10-year sentence plus a mandatory add-on of 15 years that is required by the Criminal Code. The defendant now appeals his conviction

and sentence.

¶ 33

ANALYSIS

¶ 34

I.

¶ 35

Ineffective Assistance of Counsel

¶ 36 The first argument that the defendant raises on appeal is that he is entitled to a new trial because his defense counsel was ineffective. Specifically, the defendant argues that his defense counsel allowed the State to introduce evidence that he had been arrested seven years earlier, allowed the admission of testimony that the defendant's fingerprints and DNA profile were contained in databases maintained by law enforcement, and did not object to the State's comment during opening statements that he initially refused to submit to a buccal swab for DNA comparison. We will address each contention in turn.

¶ 37 A defendant's claim of ineffective assistance of counsel is evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504 (1984). *People v. Moore*, 356 Ill. App. 3d 117, 121 (2005). "Under this test, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Henderson*, 2013 IL 114040, ¶ 11. "This means the defendant must show that counsel's errors were so serious, and his performance so deficient, that he did not function as the 'counsel' guaranteed by the sixth amendment." *People v. Perry*, 224 Ill. 2d 312, 342 (2007). "To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy." *Id.* at 341-42. "A defendant's failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel." *People v. Henderson*, 2013 IL 114040, ¶ 11. In addition, "[i]f it is easier to dispose of an ineffective assistance claim on the ground that

it lacks sufficient prejudice, then a court may proceed directly to the second prong and need not determine whether counsel's performance was deficient." *People v. Givens*, 237 Ill. 2d 311, 331 (2010). In analyzing a claim of ineffective assistance of counsel, we defer to the trial court's findings of facts unless they are against the manifest weight of the evidence, but we assess the ultimate legal question of whether counsel was ineffective *de novo*. *People v. Manoharan*, 394 Ill. App. 3d 762, 769 (2009).

¶ 38 (a)

¶ 39 Failure to Object to Evidence of Prior Arrest

¶ 40 The defendant argues that defense counsel was ineffective for failing to object to Officer Horstmann's testimony that he fingerprinted the defendant as part of the procedures for booking him into jail in September 2003. The defendant also complains that O'Daniel was allowed to testify, without objection, that she compared the latent fingerprint that she found on the envelope with prints contained in the AFIS database and determined that she had a match. In addition, she was allowed to testify about the fingerprint card that she received from the Carbondale police department. Finally, the defendant argues that although the circuit court sustained defense counsel's objection to Cross's testimony, counsel was, nonetheless, ineffective for failing to strike the following testimony: "I am a latent fingerprint examiner, so if a fingerprint is developed that's suitable for comparison, I can actually compare it to known offenders or to our known database, called an AFIS system." We disagree with the defendant's arguments.

¶ 41 (i)

¶ 42 Fingerprint Cards

¶ 43 Evidence of other crimes is inadmissible if relevant only to show a defendant's propensity to commit crime. *People v. McKibbins*, 96 Ill. 2d 176, 182 (1983). Evidence of other crimes is admissible if it is relevant for any purpose other than to show the propensity

to commit crime. *People v. Evans*, 125 Ill. 2d 50, 82 (1988). However, we need not determine whether evidence surrounding the defendant's previous arrest was admissible to explain the fingerprint card. The issue is presented to us in terms of a claim of ineffective assistance of counsel, and as noted above, we need not determine whether counsel's actions were ineffective when the defendant has not established the prejudice prong of the *Strickland* standard.

¶ 44 With respect to Horstmann's testimony, the defendant has not established that the evidence was unduly prejudicial. Horstmann's testimony was not unduly prejudicial because, although it could be interpreted as an inference of past criminal charges, it does not imply the precise nature of the prior charges. His testimony did not establish that the defendant had been convicted of any crimes or the reason why he was booked into the jail. Horstmann's testimony merely established that the defendant had been arrested and booked into the Jackson County jail in 2003.

¶ 45 In *People v. McGhee*, 238 Ill. App. 3d 864, 877 (1992), the defendant argued that references to fingerprint cards were improper because they suggested that he had committed another offense prior to the charges in that case. The court, however, held that the testimony had probative value and was not unduly prejudicial. The court noted that "when the evidence of prior criminality is inferential and not direct, the dispositive issue as to the propriety of admitting such evidence depends upon the probative and prejudicial effect of the nexus between the admitted evidence and the prior criminality." *Id.* The court held that, in that case, "the mere inference that defendant had committed some offense in the past, without some suggestion as to the nature and circumstances of that offense, fails to rise to a level of prejudice sufficient to overcome the obvious probative value such evidence provided in connecting defendant to this crime." *Id.* The court noted that perhaps the defendant's prior arrest was for "some minor offense or because of his failure to post bond on a traffic

offense." *Id.* "Without any further indication as to the basis for his fingerprints on the arrest card, there is insufficient evidence of defendant having committed a prior criminal offense, evidence of which would have unduly prejudiced him in this case." *Id.*

¶ 46 In *People v. Lewis*, 165 Ill. 2d 305, 347 (1995), the supreme court held that a defendant was not unduly prejudiced by evidence showing that "an FBI fingerprint check" revealed that he was in custody in California. The court held that the defendant was not unduly prejudiced because "the jury heard neither direct evidence nor argument" concerning the defendant's other convictions. *Id.*

¶ 47 Likewise, in the present case, Horstmann's testimony was not unduly prejudicial. Horstmann did not testify about the nature of any past arrest or whether the defendant had been previously convicted of any crimes. Under the same analysis, O'Daniel's testimony that she obtained the fingerprint card from the Carbondale police was also not unduly prejudicial. She testified that she did not know where they got the fingerprint card from. The testimony with respect to the fingerprint card only established that it was created after a prior arrest in 2003, that it contained the defendant's fingerprints, and that it was used for comparison purposes when examining prints lifted from evidence taken from the crime scene. The State never attempted to prove that the defendant had been convicted of any other crimes and did not emphasize any prior arrests during opening statements or closing arguments.

¶ 48 Under these facts, the defendant cannot establish the prejudice prong of the *Strickland* standard for counsel's failure to object to testimony concerning the fingerprint cards. This testimony was not so prejudicial that a reasonable probability exists that the result of the proceeding would have been different had the evidence been excluded.

¶ 49 (ii)

¶ 50 AFIS system

¶ 51 Cross's testimony was even more innocuous. She merely testified that as a fingerprint

examiner, she could, in general, compare a latent fingerprint "to known offenders *or* to our known database, called an AFIS system." (Emphasis added.) Cross was not allowed to testify concerning any actual comparison she performed with respect to the defendant's fingerprints. Therefore, her testimony did not connect the defendant with the AFIS system or any prior arrests or offenses. In addition, her reference to the "AFIS system" was ambiguous at best. As the State points out, the AFIS system is a computer database that includes fingerprints of arrested individuals as well as police officers and a variety of government employees. Therefore, any inference drawn from Cross's reference to the AFIS system would be pure speculation. *People v. Jackson*, 304 Ill. App. 3d 883, 895 (1999) (witness's testimony about the AFIS was ambiguous).

¶ 52 Under the same reasoning, O'Daniel's testimony on cross-examination by defense counsel that the AFIS system was an Illinois State Police database was also ambiguous and not unduly prejudicial. We cannot find that her brief statement concerning the AFIS system overpersuaded the jury on the issue of the defendant's guilt. *Lewis*, 165 Ill. 2d at 347 (evidence that the defendant was in custody in a facility in California and extradited to Illinois had no tendency to overpersuade the jury on the issue of the defendant's guilt).

¶ 53 Accordingly, the defendant has not established undue prejudice with respect to the admission of this testimony that referenced the AFIS system. The defendant has failed to establish the prejudice prong of the *Strickland* standard with respect to this testimony, and we need not determine whether counsel's performance was deficient with respect to the admission of the testimony.

¶ 54 (iii)

¶ 55 CODIS

¶ 56 The defendant also takes issue with defense counsel's cross-examination of Detective Kemp, in which he questioned the detective about the "CODIS" database.

¶ 57 During his direct examination, Kemp testified that the investigators "had a DNA hit on a bandana that was found at the scene" and that "the suspect the hit came back to was at the Jackson County Jail at the time, so we interviewed him." The detective then described his interview of the defendant. During cross-examination, defense counsel asked the detective, "Okay, and so when a hit came back from the, I guess, CODIS, you called it?" He responded, "I believe so." This was the only testimony during the trial that made reference to "CODIS."

¶ 58 On appeal, the defendant argues that Kemp's testimony was prejudicial because it informed the jury that his DNA was contained in a government database which, in turn, implied that he was a convicted felon or sex offender. The defendant's argument is incorrect. Kemp's reference to CODIS on cross-examination was extremely vague and ambiguous and, therefore, not prejudicial. The evidence presented at the trial did not include any testimony that explained to the jury what the acronym "CODIS" stood for or what exactly the CODIS database encompassed.

¶ 59 The testimony at the trial referencing CODIS is similar to the testimony concerning the AFIS system. The testimony was vague and ambiguous. There was no testimony or evidence introduced at the trial that linked CODIS with prior criminal activity. Therefore, evidence that the defendant's DNA was contained in the CODIS database, in and of itself, did not unduly prejudice the defendant. The State did not offer any testimony to establish how the defendant's profile came to be in the database or any testimony that linked the CODIS DNA database with prior criminal activity. *People v. Jackson*, 232 Ill. 2d 246, (2009) (the trial court did not abuse its discretion in allowing the limited reference to the DNA database evidence when no evidence adduced connected the defendant to other crimes).

¶ 60 The testimony presented at the trial that referred to the source fingerprint card, the

AFIS system, and CODIS, was ambiguous, fleeting in nature, and did not directly refer to any past criminal activity. Considering the nature of the testimony in light of the other evidence in this case, including properly admitted and unobjected-to DNA and fingerprint evidence that was gathered at the crime scene, there is no reasonable possibility that this ambiguous testimony overpersuaded the jury to convict the defendant. See, e.g., *People v. Warmack*, 83 Ill. 2d 112, 128-29 (1980) (admission of defendant's mug shot bearing an arrest date prior to the offense in question was harmless in light of "the abundant evidence of guilt"); *People v. Butler*, 58 Ill. 2d 45, 49 (1974) (vague and indirect reference to a previous arrest for murder held to be harmless; possibility of an effect on the jury was speculative). Under the facts of this case, the defendant has failed to establish the prejudice prong under the *Strickland* standard with respect to counsel's performance in allowing the admission of testimony referencing the source of the fingerprint card, the AFIS system, and CODIS.

¶ 61

(b)

¶ 62 State's Opening Statement That the Defendant Refused to Submit to a Buccal Swab

¶ 63 The defendant also argues that his counsel was ineffective for failing to object during the State's opening statement when the prosecutor told the jury that he refused to submit to a buccal swab after his arrest. Although the defendant's attorney subsequently filed a successful motion *in limine* that prevented the State from introducing evidence that he refused to give a DNA sample, the defendant argues that his counsel was, nonetheless, ineffective for failing to timely object and moving to strike that portion of the State's opening statement. Again, we believe that the defendant has failed to establish the prejudice prong of the *Strickland* standard with respect to this argument.

¶ 64 As noted above, under the second prong of the *Strickland* standard, the defendant must prove that, but for counsel's errors, the trial result would have been different. *People v. Evans*, 209 Ill. 2d 194, 219-20 (2004). We do not believe that there is a reasonable

probability that the result of the defendant's trial would have been different if counsel objected to this portion of the State's opening statement and moved to strike it. The comment was brief and was not repeated after the court granted the defendant's motion *in limine*. The defendant's failure to submit to a buccal swab was not relied on by the State to prove that the defendant was guilty of home invasion. Accordingly, the statement was not prejudicial particularly in light of the properly admitted DNA and fingerprint evidence. See *People v. Johnson*, 218 Ill. 2d 125, 142-44 (2005) (defendant failed to establish the prejudice prong of the *Strickland* standard for counsel's failure to object to portion of opening statement).

¶ 65 Once the circuit court granted the defendant's motion *in limine*, the decision not to ask the circuit court to strike the statement was a matter of trial strategy. There is a strong presumption that challenged conduct falls within the realm of sound trial strategy, and the defendant must overcome this presumption. *People v. Williams*, 305 Ill. App. 3d 517, 529 (1999). By filing the motion *in limine*, defense counsel successfully argued that the defendant's refusal to submit to a buccal swab was improper evidence. Counsel's decision to forego a request to strike the statement could be a strategic decision. Indeed, the supreme court has held that an attorney may forego a motion to strike for strategic reasons. *People v. Evans*, 209 Ill. 2d 194, 221 (2004) ("It is highly possible that defense counsel allowed the statement [regarding other crimes] to pass without objection to diffuse its importance, rather than object and draw further attention to the statement."). In the present case, the defendant's counsel may have concluded that a motion to strike the statement would have drawn unwanted attention to the brief comment that the prosecutor made during opening statements. Under these facts, the defendant has not overcome the strong presumption that the failure to object or move to strike was a sound strategic decision. *People v. White*, 2011 IL App (1st) 092852, ¶ 75.

¶ 66 Furthermore, the circuit court specifically instructed the jury that "[n]either opening

statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded." In *People v. Klinier*, 185 Ill. 2d 81, 127-28 (1998), a prosecutor's improper remarks did not result in substantial prejudice to the defendant where the court instructed the jury that opening statements were not evidence and the prosecution never presented any evidence concerning the improper statement. See also *People v. Graca*, 220 Ill. App. 3d 214, 221 (1991) ("We *** find significant the fact that before the opening statements were made, the court informed the jury that opening statements were not to be considered as evidence.").

¶ 67 In the present case, the court instructed the jury concerning the nature of opening statements both before opening statements and at the end of the trial, before deliberation. The prosecution made the brief comment during opening statements, but did not elicit any testimony on the subject from any witnesses in compliance with the circuit court's order excluding such evidence. Nothing in the record indicates that the jury was unable to understand the court's instruction that opening statements were not evidence and to disregard any statements that were not based on the evidence. Although the pattern jury instruction cautioning that opening statements are not evidence is not always curative when a prosecutor makes an improper statement, the instruction is a factor for the court to consider in evaluating the prejudicial effect of the comment. *People v. Bunning*, 298 Ill. App. 3d 725, 729 (1998). Under the facts of the present case, in light of the entire proceeding, including the instruction, the defendant cannot establish either prong of the *Strickland* standard with respect to counsel's failure to object or move to strike that portion of the State's opening statement.

¶ 68 II.

¶ 69 Sufficiency of the Evidence That the Defendant Was Armed With a Firearm

¶ 70 The defendant's final argument is that the State presented insufficient evidence to prove that he was armed with a firearm during the home invasion. We disagree.

¶ 71 When presented with a challenge to the sufficiency of the evidence in a criminal case, the reviewing court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). We will reverse a conviction under this standard only when the evidence is so unreasonable, improbable, or unsatisfactory that there remains reasonable doubt of the defendant's guilt. *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 72 As noted above, the defendant was convicted of committing home invasion while armed with a firearm in violation of section 12-11(a)(3) of the Criminal Code (720 ILCS 5/12-11(a)(3) (West 2010)). The sentencing provision contained in section 12-11(c) of the Criminal Code provides that when a defendant is convicted of home invasion while armed with a firearm, the offense "is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/12-11(c) (West 2010).

¶ 73 The definition of the term "firearm" is found in section 1.1 of the Firearm Owners Identification Card Act. 720 ILCS 5/2-7.1 (West 2010); 430 ILCS 65/1.1 (West 2010). Section 1.1 of the Firearm Owners Identification Card Act defines the term "firearm" as "any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas." 430 ILCS 65/1.1 (West 2010). The definition specifically excludes items such as pneumatic guns, spring guns, paint ball guns, BB guns, or signal guns. *Id.*

¶ 74 The defendant argues that the State failed to prove that the item he carried during the home invasion was a firearm because the State did not prove that it was not a toy gun or a BB gun. The gun that was used during the home invasion was never recovered and, therefore, was not admitted into evidence. The defendant concludes that the evidence was insufficient to convict him under section 12-11(a)(3) of the Criminal Code and to impose the

additional mandatory 15-year sentence.

¶ 75 In *People v. Malone*, 2012 IL App (1st) 110517, the defendant was convicted of armed robbery and argued that the charges should be reduced to robbery because the evidence was insufficient to prove beyond a reasonable doubt that he was armed with a firearm as defined in section 1.1 of the Firearm Owners Identification Card Act. *Id.* ¶ 40. The defendant in *Malone* made the same argument that the defendant in the present case makes on appeal, *i.e.*, that the item he possessed during the robbery could have been a BB or toy gun. *Id.* ¶ 41. The court, however, disagreed, noting that the victim testified that, although it was the first gun he had ever seen, the defendant held what looked like a black gun during the robbery. The court, citing *People v. Washington*, 2012 IL 107993, stated, "There was no contrary evidence presented that the gun was a toy gun, a BB gun, or anything other than a 'real gun.'" *Malone*, 2012 IL App (1st) 110517, ¶ 52. Viewing the evidence in the light most favorable to the prosecution, the court concluded that a rational trier of fact could have found beyond a reasonable doubt that the defendant was armed with a gun that met the statutory definition of a firearm. *Id.*

¶ 76 In *Washington*, the defendant was convicted of armed robbery, aggravated kidnapping, and aggravated vehicular hijacking while armed with a "firearm." *Washington*, 2012 IL 107993, ¶ 5. The victim in that case testified that the defendant held a gun to his head while committing the offenses. *Id.* ¶ 10-11. On appeal, the defendant argued that the evidence was insufficient to prove that he committed the offenses while armed with a firearm. The supreme court disagreed and held that, viewing the victim's unequivocal testimony and the circumstances under which he was able to see the gun, in the light most favorable to the prosecution, a rational trier of fact reasonably could have inferred that the defendant possessed a real gun and convicted him on the charged offenses. *Id.* ¶ 36-37.

¶ 77 Likewise, in the present case, the victims' testimony was more than sufficient for the

jury to conclude that the defendant was armed with a firearm. Although Jenna testified that she was not familiar with guns, she nonetheless testified that the defendant brandished a black automatic handgun; he pointed it at her head. She was able to explain to the jury how she concluded that the weapon was an automatic handgun as opposed to a revolver. Lindsey also told the jury that she did not know anything about guns, but her description of the weapon was consistent with Jenna's, *i.e.*, a square, black gun approximately six inches in length. The victims' testimony concerning how the defendant brandished the weapon is consistent with the jury's finding that it was a firearm. The circumstances under which the victims were able to see the gun are relevant in assessing the jury's finding. See *id.* ¶ 36. No evidence was presented that could lead the jury to any other conclusion but that the handgun was a "firearm." Viewing the evidence in the light most favorable to the prosecution, a reasonable trier of fact could conclude that the defendant was armed with a firearm when he committed the offense of home invasion.

¶ 78

CONCLUSION

¶ 79 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 80 Affirmed.